



# Symposium Foreword: Indian Nations and the Law

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# SYMPOSIUM: INDIAN PROPERTY RIGHTS

## SYMPOSIUM FOREWORD: INDIAN NATIONS AND THE LAW

Joseph William Singer\*

*[The Indians'] right of occupancy is considered as sacred as the fee simple of the whites.*

Justice Henry Baldwin<sup>1</sup>

The United States has always been of two minds about Indian property. On one hand, it has almost never seen Indian lands that it did not covet; on the other hand, the reigning ideology suggested that property rights should be respected. This means that the country sought to acquire Indian lands, but tried to do so in a way that appeared to respect the rights of Indian nations as property owners. From the beginning, the United States Supreme Court has similarly swung wildly back and forth from asserting the sacred rights of property—even when held by Indian nations—and justifying conquest. The Court professes doctrines that grant legal protection to tribal property and sovereignty, yet, time and again, it has shown itself willing to sacrifice principles, ignore precedent, and silently overrule cases without even mentioning them, while establishing rules that govern Indian property and sovereignty that are nothing short of discriminatory.

The 2004–2005 term of the Supreme Court has been no different. Many authors of this symposium felt compelled to respond to the Supreme Court's recent ruling in *City of Sherrill v. Oneida Indian Nation of New York*<sup>2</sup> and for good reason. As Sarah Krakoff describes so poignantly in her article,<sup>3</sup> the Supreme Court's recent decision in *City of Sherrill* ignores canons of interpretation that the Court itself has adopted to govern treaty interpretation, reservation diminishment, and state taxation of Indian nations.<sup>4</sup> To add

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\* Professor of Law, Harvard Law School. Thanks and affection go to Martha Minow. © 2005 Joseph William Singer.

1. *Mitchel v. U.S.*, 34 U.S. 711, 746 (1835).

2. 125 S. Ct. 1478 (2005). I have also written elsewhere criticizing the reasoning in the case. Joseph William Singer, *Nine-Tenths of the Law: Title, Possession, & Sacred Obligations*, 38 Conn. L. Rev. \_\_\_\_ (forthcoming 2006).

3. Sarah Krakoff, *City of Sherrill v. Oneida Indian Nation of New York: A Regretful Postscript to the Taxation Chapter* in Cohen's Handbook of Federal Indian Law, 41 Tulsa L. Rev. 5 (2005).

4. See *id.* at 9–10. Kristen Carpenter similarly criticizes the reasoning in *City of Sherrill*. See Kristen A.

insult to injury, it blames the Oneida Indian Nation for losing its land to the state of New York, despite the fact that the Oneida Nation did all that could have been expected of it in the face of overwhelming odds.<sup>5</sup> Moreover, Krakoff argues that *City of Sherrill* conceivably opens Indian claims to broad equitable defenses that allow the “increasing weight of history”<sup>6</sup> to undermine tribal sovereignty just as Indian nations are strengthening their governmental institutions and revitalizing that very sovereignty.<sup>7</sup>

Wenona Singel and Matthew Fletcher similarly explore the meaning of *City of Sherrill* in their article.<sup>8</sup> They focus on the Supreme Court’s use of the doctrine of laches to bar Indian land claims. Because laches is an equitable doctrine created by the chancery courts to promote justice and morality, the historical context in which Indian nations lost their land is relevant to current day decisions on the applicability of doctrines whose effect is to deny those claims. Singel and Fletcher explain in detail the unjust circumstances in which tribal lands were taken by non-Indians and by the United States, often through raw power unsanctioned by legal authority.<sup>9</sup> After such exercises of raw power, the courts would often bless those acts after the fact by bending applicable law to authorize what were plainly unlawful land grabs.<sup>10</sup> They conclude by explaining that the laches doctrine co-exists with other equally applicable equitable principles such as the clean hands doctrine that could easily justify not applying laches to bar these claims.<sup>11</sup>

In her article, Anne Zimmermann explains the complicated and inconsistent rules of jurisdiction relating to state taxation in Indian country.<sup>12</sup> The law in this area starts from the premise that Indian nations and Indians who live and work in Indian country are exempt from state taxation, as is Indian property held in trust or located within reservation borders.<sup>13</sup> However, Zimmermann notes the myriad of ways in which the Supreme Court has authorized state incursions on tribal sovereignty by allowing state taxation of tribal activity on Indian lands when it involves commercial sales to non-Indians.<sup>14</sup> She further notes that the Supreme Court’s rulings in *County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*<sup>15</sup> and *Cass County v. Leech Lake Band of Chippewa Indians*<sup>16</sup> have the potential to result in the loss of a substantial

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Carpenter, *Recovering Homelands, Governance, and Lifeways: A Book Review of Blood Struggle: The Rise of Modern Indian Nations*, 41 Tulsa L. Rev. 79 (2005).

5. See Krakoff, *supra* n. 3 at 14–17. For another critique of *City of Sherrill* along similar lines, see Singer, *supra* n. 2.

6. See *State v. Elliott*, 616 A.2d 210, 218 (Vt. 1992). See Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 Ga. L. Rev. 481 (1994) (criticizing Vermont’s ruling in *Elliott*).

7. See Krakoff, *supra* n. 3 at 10–11, 18–19.

8. Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 Tulsa L. Rev. 21 (2005).

9. See *id.*

10. See *id.* at pt. V.

11. See *id.* at 128–29.

12. Anne Zimmermann, Student Author, *Taxation of Indians: An Analysis and Comparison of New Mexico and Oklahoma State Tax Laws*, 41 Tulsa L. Rev. 91 (2005).

13. See *id.* at 92.

14. See Zimmermann, *supra* n. 12.

15. 502 U.S. 251 (1992).

16. 524 U.S. 103 (1998).

amount of tribal land through state tax foreclosures.<sup>17</sup> She also compares how well New Mexico and Oklahoma have done in amending their state statutes to accord with Supreme Court rulings on the allowable extent of state taxing authority in Indian country.<sup>18</sup>

When the Supreme Court issued its ruling in *Kelo v. City of New London*,<sup>19</sup> much of the country erupted with outrage at the idea of taking property from one person for the purpose of transferring it to others in the name of the public good. Many argued that this had not been done historically in the United States and found the practice abhorrent. Putting aside the fact that, perhaps unbeknownst to many, it has been relatively common to take property from some owners and transfer it to others for urban redevelopment purposes, Stacy Leeds explains in her article<sup>20</sup> what was painfully obvious to anyone who pays attention to Indian property issues, i.e., that government takings of property from some to transfer to others was standard government policy throughout the nineteenth century; it was, after all, the way the United States obtained tribal title for the purpose of transferring it to non-Indian owners.<sup>21</sup> Such ideas even persisted to the twentieth century and even the present day, as the *City of Sherrill* decision shows. Leeds goes on to consider the wisdom of tribal government use of the eminent domain power.<sup>22</sup> She notes that although this might not have been something the Cherokee Nation government would ever have historically contemplated doing, it is a powerful and useful tool of sovereign power that tribal governments should consider employing in appropriate cases to address otherwise intractable issues arising from fractionated ownership.<sup>23</sup>

What these articles have in common is a sense of frustration with the willingness of the Supreme Court to bend the rules to protect the interests of non-Indians, while failing to apply clearly applicable rules of law that were enacted by Congress and agreed to by the United States in solemn treaties to protect the interests of Indian nations. In an era when many people support a “restrained” judiciary willing to defer to Congress on the basis of “strict construction” of both statutes and constitutional text, it is frustrating to find a Supreme Court that supposedly adheres to that philosophy, yet is so willing to ignore precedent and the text of the United States Constitution, federal treaties, and statutes in the interest of providing equitable treatment to non-Indian interests, while showing a fundamental misunderstanding of both the history of the United States’ relations with Indian nations and the basic principles of federal Indian law. After all, it is not as if Congress and the non-Indian public are without remedy if the Supreme Court were to act to protect tribal property rights with as much vigor as it protects the property rights of non-Indians; yet, the Supreme Court consistently fails to accord Indian nations

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17. See Zimmermann, *supra* n. 12, at 113–16.

18. See *id.* at pts. III–IV.

19. 125 S. Ct. 2655 (2005).

20. Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 Tulsa L. Rev. 51 (2005).

21. See *id.*

22. See *id.* at pt. VII.

23. See *id.*

the same protections it grants non-Indian owners and non-Indian sovereigns.<sup>24</sup> The Supreme Court has interpreted the U.S. Constitution to give Congress “plenary power” over Indian affairs, giving Congress ample power to pass legislation to protect the legitimate interests of non-Indians. And despite Congress’s attempt to outlaw treaty making between the United States and Indian nations, nothing prevents the United States from negotiating with Indian nations to reach agreements that settle whatever differences exist.

The Supreme Court’s eagerness to step into the fray to protect the interests of non-Indians is insulting in another way: it assumes that non-Indians would be subject to oppressive and unjust treatment if they were subject to tribal authority. The evidence actually points the other way. Because of the plenary power doctrine, Indian nations have extraordinary incentives to be fair to non-Indians whose interests are affected by their sovereign acts. If the last twenty years of Supreme Court rulings are any guide, Indian nations cannot expect to have their rights protected by the Supreme Court. This is a case of the pot calling the kettle black.

How are we to get through such times when the Court fails to protect Indian nations from loss of their rights? One antidote is to recognize what Indian nations have accomplished and continue to accomplish. Kristen Carpenter’s review of Charles Wilkinson’s new book<sup>25</sup> reminds us through poignant stories and historical details the extraordinary accomplishments of Indian nations in revitalizing tribal sovereignty since the dark days of termination. Their tenacity, ingenuity, creativity, and strength demonstrate again and again that, even as they deal with grave problems, Indian nations will continue to thrive through adverse Supreme Court rulings. After all, if they survived removal, allotment, and termination, they can survive anything, even a Supreme Court that does not understand them.

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24. I have written on this theme for a long time. See Joseph William Singer, *Canons of Conquest: The Supreme Court’s Attack on Tribal Sovereignty*, 37 New Eng. L. Rev. 641, 667–68 (2003); Joseph William Singer, *Lone Wolf, or How to Take Property By Calling It a “Mere Change in the Form of Investment,”* 38 Tulsa L. Rev. 37 (2002); Joseph William Singer, *Sovereignty and Property*, 86 Nw. U. L. Rev. 1 (1991).

25. Carpenter, *supra* n. 4 (reviewing Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (W.W. Norton & Co. 2005)).